

- (2) Did claimant's alleged accidental injury arise out of and in the course of her employment with respondent?
- (3) Did respondent have timely notice of claimant's alleged accidental injury?
- (4) Is claimant entitled to past, but unpaid, medical expenses?
- (5) Is claimant entitled to temporary total disability compensation and, if so, how much?
- (6) Is claimant entitled to past medical expenses authorized and accrued, but not paid?
- (7) Is claimant entitled to future medical treatment?
- (8) What, if any, is the nature and extent of claimant's injury and/or disability?
- (9) What is the amount of compensation, if any, due as a result of claimant's alleged accidental injury with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury on September 15, 1999, when, as she was walking around a corner, pulling a rack filled with garments, she felt a sudden pain in her knee. Claimant did not advise any of her coworkers or supervisors of the injury, but continued performing her regular duties. Claimant testified her knee continued to get worse. By October 22, 1999, when she awoke to get out of bed in the morning, her knee would be in significant pain and, at times, would give out and claimant would nearly fall.

Claimant still did not advise her employer of her problems, but instead went to her personal physician Mike Mathews, M.D., on October 22, 1999. Dr. Mathews examined claimant, took a history of the September 15, 1999, injury and recommended claimant undergo an MRI. The MRI was performed on November 12, 1999. At that time, claimant was diagnosed with a tear in the posterior portion of her medial meniscus and chondromalacia. Claimant was then referred to Brian C. Kindred, M.D., of Johnson County Orthopedics. Claimant underwent surgery at the Olathe Medical Center on January 13,

2000. Claimant returned to work with respondent and continued in that employment at the time of regular hearing.

Claimant was examined by Peter V. Bieri, M.D., board certified in impairment and disability determinations, on June 12, 2000. At that time, claimant gave Dr. Bieri a history of a specific trauma on September 15, 1999. There was no mention of any additional trauma or additional worsening of claimant's condition. Dr. Bieri examined claimant, finding as the result of her injury on September 15, 1999, she suffered an 18 percent impairment to the left lower extremity, including 12 percent to the left knee for weakness, 2 percent for residuals from the surgery and 5 percent for her patellofemoral pain. This opinion was pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Claimant testified she first discussed her problem with her employer when she approached April Laythe, respondent's operations secretary. The exact date was not known. However, claimant acknowledged it would have been after the November 12, 1999, MRI. Claimant testified that it might have been the week after the MRI, but she was not sure. She also testified that it may have been around Thanksgiving which, in 1999, occurred on November 25.

Ms. Laythe testified that claimant did contact her sometime in November. Claimant mentioned, during a casual conversation, that she had suffered a knee injury but was not sure if it was work related. When claimant discussed the matter with Ms. Laythe, she was told to talk to Karen Anderson which she did on December 1, 1999.

Claimant talked to Karen Anderson, respondent's store manager, on December 1, 1999. At that time, claimant reported the accident as work related. An accident report was prepared on that date. The accident report discusses an injury to claimant's left knee when the knee was twisted as she was pushing a rolling rack. It shows the date of accident of September 15, 1999.

Ms. Anderson testified that Ms. Laythe was not involved in workers compensation litigation or in the gathering of workers compensation information.

In workers compensation litigation, the burden of proof is on claimant to prove her entitlement to the benefits requested by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). In order for a claim to be compensable, claimant must prove that he or she suffered personal injury by accident arising out of and in the course of his or her employment with the employer. See K.S.A. 1999 Supp. 44-501.

The phrase "out of employment" points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment when there is apparent to the rational mind upon

consideration of all the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of employment" relates to the time, place and circumstances under which the accident occurred and means the injury happened while the worker was at work in his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

Claimant's testimony regarding how the accident occurred on September 15, 1999, is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The Appeals Board finds based upon the testimony of claimant that claimant did suffer personal injury by accident arising out of and in the course of her employment with respondent on September 15, 1999.

K.S.A. 44-520 requires notice of accident stating the time and place and particulars thereof within 10 days after the date of accident. In this instance, it is uncontradicted that claimant failed to advise respondent of the accidental injury within 10 days of the September 15, 1999, accident date.

Claimant argues that she suffered a series of accidents through November 12, 1999, which was the date she was first advised of the seriousness of her condition. The evidence does not support this contention, and the Board rejects claimant's arguments in this regard.

Claimant was aware she suffered a specific traumatic incident on September 15, 1999. She was aware that this incident occurred as the result of her pushing a rack and walking around the corner while working for respondent. Claimant's condition did progressively worsen until by October 22, 1999, she was required to seek medical treatment with her personal physician. She advised her personal physician of a specific injury which occurred on September 15, 1999. Claimant testified that, by that time, her knee would sometimes give out as she got out of bed. Claimant was also aware as of October 22, 1999, that the condition was serious enough to necessitate additional examinations and diagnostic measures, such as the MRI which was performed on November 12, 1999. Even after claimant was diagnosed with a tear in the posterior portion of her medial meniscus and chondromalacia, she did not advise a representative of respondent of her condition. Instead, she spoke to a coworker, April Laythe, who had no supervisory or workers compensation responsibilities for respondent. Claimant did not approach respondent's representative, Karen Anderson, until December 1, 1999.

The 10-day notice provision provided in K.S.A. 44-520 will not bar proceedings for compensation if it is shown that the claimant's failure to notify respondent of her accident within the 10-day time limit was due to "just cause."

When considering whether just cause has been established under K.S.A. 44-520, the Appeals Board has developed certain factors which may be considered. Although not intended as an exhaustive list, those factors include:

- (1) The nature of the accident, including whether the accident occurred as a single traumatic event or developed gradually;
- (2) Whether the employee is aware they have sustained either an accident or injury on the job;
- (3) The nature and history of claimant's symptoms;
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident or whether the respondent has posted notice as required by K.A.R. 51-12-2.

See Russell v. MCI Business Services, WCAB No. 201,706 (Oct. 1995).

In this instance, claimant was aware she suffered an immediate onset of pain which gradually worsened through her first medical examination on October 22, 1999. Claimant did not deny that she was aware she had suffered an incident on September 15, 1999, and the history of claimant's symptoms is uncontradicted.

The only testimony regarding whether claimant was aware of the reporting requirements came from Ms. Anderson. She testified that claimant was advised, as were all employees, that they were to report any accidents to their supervisor immediately. The first indication claimant reported this matter to any supervisor was the December 1, 1999, meeting with Karen Anderson.

In reviewing the record, the Appeals Board finds claimant failed to provide notice in a timely fashion and further that she has failed to prove just cause for this lack of notice. As such, the Appeals Board finds, pursuant to K.S.A. 44-520, that claimant should be denied benefits for the accidental injury occurring on September 15, 1999. As such, the Award of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated January 11, 2001, denying claimant benefits in the above matter, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
John M. Graham, Jr., Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director